UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 04-2564

MICHIGAN FAMILY RESOURCES, INC.

Plaintiff-Appellee

v.

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) LOCAL 517M

Defendant-Appellant

On Appeal from the United States District Court
For the Western District of Michigan, Southern Division
District Court Case No. 1:04CV0019
The Honorable Gordon J. Quist Presiding

BRIEF OF AMICUS CURIAE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Advocates for employers or labor unions are not eligible for admission. As of January, 2006, the Academy had 637 members in the United States and Canada. The principal purposes of the Academy, as set out in its Constitution, are "to establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . . ; to promote the study and understanding of the arbitration of labor-management and employment disputes. . . ."

The Academy believes that the involvement of the law in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, should serve to effectuate the purposes for which employers and unions have developed voluntary arbitration. The tenor of Supreme Court decisions concerning arbitration has generally fulfilled that purpose. The present case has the potential for disturbing the salutary regime established by the

[1] The parties have consented to the submission of this brief.

Supreme Court's prior decisions. For that reason the Academy thought it appropriate to file this brief.

This case is typical of many in which a court finds that an arbitrator's interpretation of contract language did not draw its essence from the contract. Our hope is that our brief will assist the Court to understand the context in which cases like the present one arise, and to formulate doctrine supportive rather than disruptive of a process that employers and unions alike have found highly desirable for the final resolution of labor-management disputes.

SUMMARY OF ARGUMENT

The Court should abandon its four-part test for determining whether an arbitrator's award draws its essence from the collective bargaining agreement. Although the Court's opinion recognizes that judicial review of arbitrators' decisions is to be limited, the four-part test not only mandates a review of the merits, it also requires the Court to assign meaning to contract language. This far exceeds the scope of judicial review permitted by Supreme Court decisions and undermines the parties' agreement that arbitration awards are to be final and binding.

ARGUMENT

I. INTRODUCTION

Our purpose in this brief is to convince the Court that its four-part test for determining whether an arbitrator's award draws its essence from the contract, applied by the panel in the instant case, is inconsistent with the standards articulated by the Supreme Court and misconstrues its role in the dispute settlement process of arbitration. It is not necessary to review this case or similar ones in great detail. The parties will address those matters in their briefs and, frankly, it is not easy to improve on the arguments advanced in Judge Sutton's concurring opinion.[2] But a brief review highlights our concern about the Court's test.

By now, the standards for judicial review of arbitration awards are well-known both to students and practitioners of labor law, and to courts that review arbitration decisions. In the seminal case of United Steelworkers of America v. Enterprise Wheel & Car Corp, 363 U.S. 593 (1960), part of the Steelworkers Trilogy that staked out the proper roles of court and arbitrator, the Supreme Court stressed the responsibility of the arbitrator to interpret the

[2] In the forthcoming edition of their widely-used casebook, Professors Gorman and Finkin, two of the country's leading labor law scholars, note the different approaches of various courts of appeal, and then quote extensively from Judge Sutton's concurring opinion. See, A. Cox, D. Bok, R. Gorman, & M. Finkin, LABOR LAW (14th Ed. 2006) at 843-44.

agreement and the lower courts' obligation to avoid reviewing those decisions on the merits. But it also recognized that the arbitrator's discretion was not boundless:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. Id. At 597

This Court and others have focused on the "essence" requirement to justify analysis of the merits of an award. This Court relies on a four-part test to determine whether an award draws its essence from the agreement, and finds that it does not if

> (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement. Sterling China Co. v. Glass Workers Local No. 24, 357 F. 3d 546, 556 (6th Cir. 2004).

As we will argue below, this test not only permits the Court to delve too deeply into the merits of the case, it requires it to do so, an action that undermines the parties' bargain and the arbitral process.

II. THE COURT'S FOUR-PART TEST REQUIRES THE COURT TO REVIEW AN ARBITRATOR'S AWARD ON THE MERITS AND TO DECIDE WHETHER IT CONFLICTS WITH THE EXPRESS MEANING ATTRIBUTED TO THE CONTRACT BY THE COURT.

A. The Court's Four-Part Test

One commentator has described the "essence" test as "an unfortunate choice of words." See David Feller, Labor Arbitration: Past, Present, and Future: Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards, 19 Berkeley J. Emp. & Lab. L. 296, 302 (1998). But it is clear that the Supreme Court did not intend the phrase to undermine its requirement of limited judicial review, which it re-emphasized in subsequent opinions. In United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987), the Court noted its admonition in Enterprise Wheel that an award must "draw its essence" from the agreement, and continued:

> But as long as the arbitrator is **even arguably construing or applying the contract** and acting within the scope of his authority, that a court is convinced he committed grievous error does not suffice to overturn his decision. [Emphasis added.] Misco at 38.

The Court reiterated the same test in Eastern Associated Coal Corporation v. United Mine Workers of America, District 17, et al., 531 U.S. 57, 62 (2000) and Major League Baseball Players Association v. Garvey, 532 U.S. 504, 509 (2001). This Court's four-part test for determining whether an

arbitrator's award draws its essence from the agreement is inconsistent with the Supreme Court's explanation of that requirement.[3]

Each of the Court's four tests focuses on whether the arbitrator's decision was correct, not whether his decision was based on – or even arguably based – on the arbitrator's interpretation of the contract. The first test looks for conflict with the "express terms" of the agreement, which involves a determination of what those terms are and what they mean. In the instant case, the arbitrator effectively found an implied agreement for parity in cost of living wage increases. But the Panel rejected that analysis because it found it to conflict with the express terms of the contract that, it decided, did not require parity. The second test also requires a review of the merits. This Court cannot decide whether the arbitrator imposed an additional term without deciding what the "express terms" require. That was apparent in this case where the Court rejected the arbitrator's conclusion that the contract required parity because it was inconsistent with its "one proper meaning." The third test includes the Court's reference to "rational support" or rational derivation, which requires it to decide what the contract means before it can assess the rationality of the arbitrator's effort. Finally, the

[3] "Such formulations [as the four-part test], however, almost of necessity require that a reviewing court violate both the letter and the spirit of Misco and Eastern Coal. . . ." See, R. Gorman & M. Finkin, Basic Text on Labor Law (2nd Ed. 2004) Section 25.5 at 831.

fourth test requires compliance with the "exact terms" of the contract, which obviously requires the Court to determine what those terms are.

These tests have led this Court and others to similar forays into labor contract interpretation. In its recent decision in Spero Electric Corporation v. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 1377, 439 F.3d 324 (6th Cir. 2006), this Court overturned an arbitrator's conclusion that a letter written by a company attorney following a meeting between the parties effectively waived the Company's right to modify a work rule that was not part of the agreement. In doing so, the Court not only parsed contract language, it also reviewed the bargaining history of the agreement. The Court decided the arbitrator's interpretation did not draw its essence from the contract because it was not in accord with what the Court determined to be its express meaning.

In Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union 2713, 103 F.3d 449 (5th Cir. 1997), cert. den., 522 U.S. 928 (1997), the labor contract allowed the employer to discharge employees for a first offense of "immoral conduct." An employee lied to her supervisor about the need for an unpaid 45 minute absence from work. The arbitrator called this "poor judgment," but he did not find it to be immoral conduct. The Fifth Circuit said it was required to uphold

arbitrators' awards if they drew their essence from the contract, but it decided this decision did not meet that test. Citing Black's Law Dictionary, the Court said lying was immoral conduct and, therefore, lying was "specifically covered by the agreement." Like the instant case, then, the Fifth Circuit found the arbitrator's interpretation contrary to the express terms of the agreement.

One last example is sufficient. In El Mundo Broadcasting Company v. United Steelworkers of America, 116 F.3d 7 (1st Cir. 1997), an arbitrator decided that a grievance protesting an employer's failure to post a job was arbitrable. The contract required an affected employee to file a grievance within 3 days of its occurrence, which no employee did. However, the arbitrator said the grievance was arbitrable, reasoning that the alleged failure to post was a continuing violation, meaning that a new grievance could arise every day. The Court recognized that other arbitrators had found continuing violations to excuse apparent untimely filings, but it said those cases concerned improper pay, not an allegedly improper appointment of an editor, which the Court characterized as a "specific occurrence." It said the arbitrator's mischaracterization of the kind of event at issue – continuing violations versus specific occurrences – "read the time provisions out of the agreement, ignoring its 'essence.' " But it should be clear that the arbitrator

determined the applicability of contract language to a particular situation, which the Court's decision essentially conceded when it referred to the arbitrator's "purported logic and treatment of plain language." The problem, then, was not that the arbitrator failed to construe the contract, but that the First Circuit disagreed with his interpretation, which it found to conflict with the express terms of the contract.

B. The Conflict Between The Traditional Judicial Role And The Principles Of Limited Review

Such searching review is sometimes attributed to judicial hostility to arbitration. In the Trilogy, the Supreme Court admonished lower courts to discard such attitudes in construing labor arbitration awards. We suspect, however, that decisions like the one at issue in this case are less the result of hostility than they are courts' reluctance to abandon their traditional responsibilities. Trial judges routinely interpret contracts and appellate courts just as routinely examine their decisions for error. It cannot be easy for a court to show restraint when reviewing arbitration decisions when it is convinced that the arbitrator's award is seriously flawed.

Courts might also be skeptical of an arbitrator's competence or motives, especially when her interpretation seems to conflict with contract language. Throughout the Trilogy, but especially in United Steelworkers of

America v. Warrior and Gulf Navigation Co. 363 U.S. 574 (1960), Justice Douglas spoke of the unique character of labor arbitration and the arbitrator's special competence to resolve the disputes:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed. Id. At 582

We agree that our members are skilled at their work. Many of them have heard hundreds – even thousands – of cases, and some have spent significant time on panels limited to specific industries or single bargaining relationships. In the course of that service, they have learned about the processes of employers and the functions of employees, as well as the parties' history of dispute resolution. It is not difficult to understand why that kind of experience might make them attractive to parties in resolving their disputes. Of course, not all arbitrators have such broad experience and many arbitrations are the result of *ad hoc* appointments for parties and

industries of which the arbitrator has no special knowledge. But even if most of what Justice Douglas said about labor arbitrators is true, the last sentence quoted above is not.

Courts exist to resolve disputes, which they do well. They listen to testimony, make credibility determinations, react to evidence, and interpret contracts. They are not chosen for a case because of a perceived bias for one side or the other and they are immune from charges that their decisions were influenced by a desire to remain acceptable for future disputes. What we mean to say is that judges are just as adept at decision-making as experienced arbitrators and just as likely to interpret contracts accurately. But a court's proficiency at decision-making and its suspicions about an arbitrator's competence ignore the reasons for limited judicial review.

C. The Parties' Expectations and the Proper Scope of Review

In most collective bargaining agreements, the parties adopt labor arbitration as the exclusive method of resolving disputes, shunning ordinary litigation and strikes or lockouts. More important, they agree that the decision of the arbitrator will be final and binding, an express recognition that there is to be no appeal of the award. The parties to this process are neither stupid nor idealistic; they know some of the decisions will be controversial and some will be wrong. But they agree to arbitrate anyway

because they know the decision will resolve the dispute, at least until the next round of negotiations, where the dissatisfied party can attempt to bargain new language. This is what Justice Douglas had in mind in Enterprise Wheel when he spoke of the parties' interest in uninterrupted production. Arbitration settles the dispute without resort to strikes or other economic warfare and thus is of great value to the parties, even if the decision is wrong. As one commentator has said, "the parties freely agreed to give up some accuracy in arbitration awards in exchange for greater efficiency." See, Joseph H. Bornong, Judicial Review by Sense of Smell: Practical Application of the *Steelworkers* Essence Test in Labor Arbitration Awards, 65 U. Det. L. Rev. 643,661 (1988).

But the Court's decision in the instant case, and similar decisions from other courts, turns this process on its head. Parties who are dissatisfied with the result of a case can appeal to a court for a different interpretation, arguing that the "plain meaning" of the contract language compels a rejection of the arbitrator's reading of the agreement. Using the plain meaning rule inevitably results in cases like the one at issue here, where the Court reversed the arbitrator's award because there was only "one proper interpretation." "Proper" is the key word; the Court obviously wanted the decision to be correct, to have the language interpreted as it believed the

parties must have intended it. But the parties made it clear in their agreement that the Court was to play no such role in resolving their disputes. Here, the parties hired the arbitrator to do that and, whether his decision was correct or not, they agreed to be bound by his work. The Court cited the right cases and made the appropriate observations about the limited scope of its review, but then it read the contract to admit of only one meaning and, because the arbitrator's reading was different, it concluded he exceeded his authority by adding a term and that his award did not draw its essence from the contract.

This latter observation is particularly troubling. The arbitrator analyzed the contract language and explained the factors that guided his interpretation. He was not "off on a frolic of his own," see International Truck and Engine Corp. v. United Steelworkers of America Local 3740, 294 F.3d 860, 862 (7th Cir. 2002). If the arbitrator's interpretation did not draw its essence from the contract, then it is hard to understand how the Supreme Court's explanation of a reviewing court's proper role in Misco, quoted above, is to have any meaning. The arbitrator was at least "arguably construing the contract." As the Seventh Circuit observed in reversing a district court that had applied a test similar to the ones at issue here, "Whenever an arbitrator misreads a contract, it is possible to say that his

award fails to draw its essence from the contract . . . . But so long as the award is based on the arbitrator's interpretation – unsound though it may be – of the contract, it draws its essence from the contract." See, Ethyl Corporation v. United Steelworkers of America AFL-CIO-CLC, and Local No. 7441, 768 F.2d 180, 184 (7th Cir. 1985). The Panel also said the arbitrator acted outside his authority by adding a term to the agreement, an action expressly forbidden by its language. But the only basis for that conclusion was the Court's holding that there was only "one proper interpretation" for the disputed language.

The extent to which the Court's decision controls the arbitrator's function can also be seen in another finding. The arbitrator found the parties' language to be ambiguous, primarily because of past practice. But the Court said no construction was necessary and cited one of its own opinions that said, "Past practice or custom should not be used to interpret or give meaning to a provision or clause of the collective bargaining agreement that is clear and unambiguous." See Beacon Journal Publishing Co. v. Akron Newspaper Guild, 114 F.3d 596, 601 (6th Cir. 1997). That was the course to follow here because the contract had only "one proper interpretation." Not every court of appeals agrees with this conclusion, see e.g. Ethyl Corporation, *supra* at 186, "there is no rule that an arbitrator, in

order to find an implied condition, must find the language of the contract to be ambiguous. Although a literal reading . . . would preclude the implied condition the arbitrator found, he was not obliged to read the contract literally."

This is not to suggest that the Sixth Circuit is wrong and the Seventh Circuit is right about the introduction of parole evidence or the existence of implied agreements. Either court is free to apply its rule in reviewing a district court interpretation of a contract. But the split of opinion between courts emphasizes that reasonable decision-makers can disagree about the application of various interpretative rules, or, indeed, what those rules are. In the instant case the Court compelled adherence to a rule of contract interpretation that prevails in Sixth Circuit Courts and deprived the arbitrator of an interpretative tool commonly used in arbitration. But even if the arbitrator should not have considered past practice, it is impossible to conclude that the arbitrator's interpretation did not draw its essence from the contract. The arbitrator assigned meaning to contract language, even if he got it wrong. The Court vacated the award because the arbitrator used a rule of interpretation the Court would not have used. Had the parties wanted the Court's judgment about the meaning of their contract, they could easily have agreed to forego arbitration and pursue remedies in court. Here, they opted

for arbitration and the benefits it affords, typically identified as faster and less costly than litigation and, most important, final.

III. CONCLUSION

We recognize that courts review few labor arbitration cases and that the Sixth Circuit enforces far more awards than it vacates. We also agree with our late colleague, David Feller, that courts "set aside awards that offend them deeply." See David Feller, End of the Trilogy: The Declining State of Labor Arbitration, 48 Arb. J. 18, 22 (1993). As we note above, we understand that impulse. Although we do not concede that the arbitrator's award in this case was wrong, our point is that the Supreme Court's decisions require judicial restraint and compel enforcement of the award, even if the Court believes the arbitrator was wrong, or that the contract language is not susceptible to the arbitrator's interpretation, or, indeed, even if the decision *is* wrong. In Garvey, for example, the Ninth Circuit had refused to uphold an arbitrator's award, characterizing his decision as "irrational" or "bizarre." In reversing, the Supreme Court said even though the Ninth Circuit had recited the principles of limited judicial review, "its application of them is nothing short of baffling." Garvey, *supra* at 510. The Panel in this case also recited the limiting principles, but it then rejected the

arbitrator's contract interpretation in favor of its conclusion that there could be only "one proper interpretation."

We know the parties to the agreement want their contract interpreted correctly. But arbitration is of great value even when the arbitrator errs. Unlike commercial arbitration and formal litigation, labor arbitration is not intended merely to assign fault or shift risk. It provides a peaceful forum for disputes that might otherwise escalate to strikes, lockouts, or other interference with production. This assumes, however, that the process ends when the arbitrator rules. Decisions like the one here encourage the disappointed party to seek review, thus continuing the dispute the arbitration agreement was intended to end. Rules that jeopardize the finality of the process undermine the utility of arbitration as an instrument of industrial peace. We urge the Court to abandon its four-part test and to enforce arbitration awards where the arbitrator's opinion reveals that he based his decision on the contract.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P.32(a)(7)(B). The foregoing brief contains 3867 words of CG Times (14) point type. The word processing software used to prepare this brief was Microsoft Word for Windows XP.

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CERTIFICATE OF SERVICE

I certify that the attached brief of *amicus curiae* National Academy of Arbitrators was served on the following on June , 2006, by first class United States mail:

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